Supreme Court, U.S.
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No. 01-380

In the Supreme Court of the United States

LYNN ANN KIM,

Petitioner,

v.

PACIFIC BELL, A CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to issue an advisory opinion on whether to borrow the state statute of limitations for breach of contract for a claim under ERISA section 510 (29 U.S.C. § 1140), where petitioner's claim is barred in any event by the California two-year statute of limitations for oral contracts.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Lynn Ann Kim was plaintiff and appellant in the courts below. Respondent Pacific Bell Telephone Company (named in the petition as "Pacific Bell") was a defendant and appellee in the courts below. Pacific Bell's Disability Assistance Plan, Pacific Telesis Group Comprehensive Disability Benefits Plan, and General Employees' Benefits Committee were also defendants and appellees in the courts below.

Pacific Bell Telephone Company is a corporation, wholly owned by Pacific Telesis Group. SBC Communications, Inc. is a publicly held company, and is the parent company of Pacific Telesis Group.

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RESPONDENT'S BRIEF IN OPPOSITION

This petition raises a non-justiciable, abstract question of law which will not affect the untimeliness of petitioner's claim. The petition omitted mention of the district court's September 20, 1999 order granting summary judgment dismissing petitioner's fifth cause of action for breach of employment contract as untimely—the issue deferred for further briefing in the district court's initial order (Pet. 14b-17b). In the final order, the district court ruled that petitioner's employment contract was oral, and the appropriate California statute of limitations is two years. Petitioner did not contest that ruling in her appeal to the U.S. Court of Appeals for the Ninth Circuit. Petitioner filed her claim under section 510 of the Employee Retirement Income Security Act ("ERISA", 29 U.S.C. section 1140) on September 8, 1998, over two years after her October 16, 1995 termination.

Petitioner now seeks review in this Court on the theory that there is a conflict among the circuit courts about whether to apply a wrongful termination or a breach of contract statute of limitations to an ERISA section 510 claim. The petition should be denied because the applicable statute of limitations for breach of an oral contract would bar plaintiff's claim in any event.

A. This Petition Does Not Present a Justiciable Question.

Decision of whether breach of contract or wrongful termination provides the most analogous state-law limitations period for an ERISA section 510 claim cannot affect the rights of petitioner in this case.

1. The factual premise for the petition was waived.

Petitioner waived any claim that her employment was based on a written contract by failing to appeal the district court's adverse findings on her breach of contract claim. The district court determined that petitioner's claim for breach of an implied employment contract did not relate back to her original complaint. Pet. 14b-15b. Petitioner's claim for violation of ERISA section 510, like the breach of implied contract claim, was not filed until September 8, 1998. Pet. 13b, 14b.

In the order granting summary judgment to respondent, the district court found that petitioner's breach of implied contract claim was not based on any writing, and was therefore barred by the two year limit for actions on an oral contract. Calif. Code of Civ. Proc., section 339. Petitioner did not raise the dismissal of that contract claim here or in her appeal to the Ninth Circuit. Pet. 7, n. 2, Pet. 2a.

Petitioner argues that her action would be timely under the four-year limitation period permitted in California for contract actions (Calif. Code of Civ. Proc., section 337). Pet. 9. However, the petition fails to set out verbatim the statute. That statute, by its terms, only applies to any contract "founded upon an instrument in writing". Calif. Code of Civ. Proc., section 337(1). Petitioner's failure to appeal the district court's order, determining that petitioner's employment contract was not founded upon a writing, precludes petitioner's argument.

2. The petition presents no claim for relief.

Petitioner's claim for violation of ERISA section 510 is untimely, regardless of whether the appropriate statute of limitations is for wrongful termination or breach of contract. If the Ninth Circuit should not have applied the California statute of limitations for wrongful termination under *Burrey v. Pacific Gas and Elec. Co.*, 159 F.3d 388, 396-97 (9th Cir. 1998), then the two-year statute of limitations for breach of an oral contract would apply to bar petitioner's claim. See,

Hinton v. Pacific Enterprises, 5 F.3d 391, 394 (9th Cir. 1993), cert. denied, 511 U.S. 1083 (1994).

The facts of this case make the question posed by petitioner one "which cannot affect the matter in issue" and thus outside the function of this Court. *Oil Workers v. Missouri*, 361 U.S. 363, 367-68 (1960). If petitioner had been employed under a written employment agreement, then the petition would present "a real and substantial controversy admitting of specific relief," but this Court does not have the power to render "an opinion advising what the law would be upon a hypothetical state of facts." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937).

B. Petitioner's Purported Conflict Between Circuits Does Not In Any Event Justify Review.

Even if petitioner's purported question were justiciable, it would not warrant review by this Court.

1. The Eleventh Circuit does not apply breach of contract limitations to section 510 claims.

Petitioner erroneously asserts that the Eleventh Circuit analogizes an ERISA section 510 claim to a contract claim when selecting the appropriate state statute of limitations. Pet. 12-13. Consistent rulings of that court expressly reject use of statutes of limitations periods for contract actions, and adopt state statutes for retaliatory discharge or wage claims. *Musick v. Goodyear Tire & Rubber Co., Inc.*, 81 F.3d 136, 138-39 (11th Cir.), *cert. denied,* 519 U.S. 965 (1996), and cases there cited. Thus, the Eleventh Circuit is aligned with the Ninth Circuit in choosing retaliatory discharge or wrongful termination statutes of limitations, and rejecting general statutes of limitations governing contract actions.

2. The *Heideman* case does not indicate a serious conflict among the circuits.

Petitioner's claim of a conflict among the circuits is left relying only on *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1267 (8th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). Pet. 10.

This case does not show a serious circuit conflict. In the eleven years since *Heideman*, no reported decision has followed it to "borrow" a state contract statute of limitations for an ERISA section 510 claim.

Moreover, the Eighth Circuit in *Heideman* borrowed the contract limitations period "without analysis, ... allocating only one sentence to the issue of which limitations statute properly applied." *McClure v. Zoecon, Inc.*, 936 F.2d 777, 779 (5th Cir. 1991). Indeed, there is no indication that the question of how to properly characterize a section 510 action—as a contract claim or otherwise—was even contested in *Heideman*, since the plaintiff's claim was untimely even under Tennessee's six-year period for breach of contract. *Heideman v. PFL, Inc.*, *supra*, 904 F.2d at 1267. This 11-year-old variant from the consistent approach of the federal courts in determining the limitations period for a section 510 action provides no need for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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